Supreme Court, U.S.
FILED
JUN 21 1996
CLERK

No. 95-1802

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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RICHARD L. AND KATHARINE E. COUCHOT,
*Petitioners,*

v.

THE STATE LOTTERY COMMISSION,
THE OHIO DEPARTMENT OF TAXATION, AND
J. KENNETH BLACKWELL,
TREASURER OF THE STATE OF OHIO,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Supreme Court of Ohio**

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## REPLY OF THE PETITIONER

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June 21, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

8 pp

## TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1976) | 5 |
| *Delaware v. New York*, 507 U.S. 490 (1993) | 4 |
| *In re State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300 (1872) | 3-4 |
| *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435 (1944) | 2, 3, 5 |
| *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932) | 3 |
| *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954) | 2 |
| *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937) | 4 |
| *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) | 5 |
| *Shaffer v. Carter*, 252 U.S. 37 (1920) | 3 |
| *Stark v. Comptroller*, 554 A.2d 458 (Md. Ct. Spec. App. 1989), *cert. denied*, 559 A.2d 791 (Md. 1989) | 6 |
| *Texas v. New Jersey*, 379 U.S. 674 (1964) | 4 |
| *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) | 3 |

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## REPLY OF THE PETITIONER

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Respondents misstate the constitutional significance of this case and the scope and extent of the Ohio Supreme Court's errors.

1. Respondents attempt to limit the applicability of this case to nonresident individual lottery winners. But the significance of this case is far greater. In upholding Ohio's authority to tax Mr. Couchot, the Ohio Supreme Court employed reasoning which every State can—and certainly will—use to tax *any* income an individual re-

ceives from intangible property which has at any time been associated with the taxing State. The Ohio Supreme Court's reasoning is easily broad enough to tax a nonresident individual's annuity income, interest income and dividend income, if that income arises from a transaction with an Ohio "source." It certainly will not be long before the States do so.

Moreover, the constitutional principles applicable to nonresident individuals apply with equal force to nonresident (foreign) corporations. This Court has *never* held that the jurisdictional standards under the Due Process and Commerce Clauses apply to individuals, but not corporations, or that they apply differently to the two. Indeed, Respondents concede that the jurisdictional standards are the same. Opp. at 12, *citing Miller Bros. Co. v. Maryland*, 347 U.S. 340, 356 n.18 (1954) (the jurisdictional standards announced in *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435 (1944), are "applicable to both nonresident individuals and foreign corporations.") Thus, as even the Respondents concede, the dangers of the Ohio Supreme Court's decision are equally real for corporations, a fact which itself demonstrates the constitutional significance of this case.

2. Notwithstanding Respondents' claims to the contrary, the constitutional question in this case is whether, in 1989 and thereafter, Ohio has the authority to tax *Mr. Couchot*. Pet. at 6-7 n.5. In answering this question, the circumstances of the *1988* "transaction" which produced Mr. Couchot's income are irrelevant, because Respondents have conceded that Mr. Couchot won the Ohio lottery *before* Ohio taxed the lottery winnings of nonresidents. Thus, stated most simply, the question is this: in *1989*, when Ohio *first* taxed the lottery winnings of nonresidents, did Ohio have a sufficient constitutional nexus with Mr. Couchot?

Ohio clearly did not. Since 1988, the Couchots have had absolutely no connection with Ohio other than the



connection which arises from the debt Ohio owes Mr. Couchot and the annual payment Ohio mails to Mr. Couchot in Florida. Pet. at 3. Moreover, the events which occurred in 1988, and the "physical presence" which Respondents claim arises from those events, are wholly irrelevant in 1989. Any "physical presence" or other "nexus" which may have existed in 1988, clearly did *not* exist in 1989 and thereafter, and cannot give Respondents jurisdiction to tax Mr. Couchot in 1989 and thereafter.

3. Respondents fail to distinguish *In re State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300 (1872). Respondents assert that *In re State Tax on Foreign-Held Bonds* is irrelevant because it is a property tax case. That claim has already been answered. Pet. at 8 n.8. *See also International Harvester*, 322 U.S. 435, 441, *citing Shaffer v. Carter*, 252 U.S. 37, 55 (1920), and *Lawrence v. State Tax Commission*, 286 U.S. 276, 280 (1932) ("In determining whether a tax is within the state's constitutional power, we look to the incidence of the tax and its practical operation.")

Respondents assert that *In re State Tax on Foreign-Held Bonds* is irrelevant because the situs of Mr. Couchot's property is irrelevant. This overlooks the fact that, *if* Mr. Couchot owned property in Ohio in 1989, that property *might* provide Ohio with the constitutional nexus it seeks. *See Shaffer v. Carter* at 52-53 (limiting a State's jurisdiction to tax a nonresident individual to the income from "property located or business conducted" in the taxing State); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920) (to the same effect). But because Mr. Couchot's property—his debt from Ohio—is situsd to his residence, he owned no property in Ohio in 1989 and thereafter, a fact which proves that Ohio has no jurisdiction to tax him.

Respondents also emphasize that the bonds in *In re State Tax on Foreign-Held Bonds* were held *outside* the

taxing State, and that the holding of the case "thus has been limited to the narrow proposition that bonds held out-of-state cannot be taxed." Opp. at 9. Of course, this is precisely the Couchots' argument. As in *In re State Tax on Foreign-Held Bonds*, Mr. Couchot's intangible property is situsedand held by him in Florida, *not* Ohio. Thus, as in *In re State Tax on Foreign-Held Bonds*, the income from Mr. Couchot's debt cannot be taxed by Ohio any more than Ohio could impose a property tax on the debt itself.

Finally, Respondents misleadingly imply that *In re State Tax on Foreign-Held Bonds* has been overruled. Actually, what was overruled is the principle that intangible property can only be taxed by the state of the owner's domicile. Opp. at 9-10. However, the doctrine of *mobilia sequuntur personam*—the doctrine utilized in *In re State Tax on Foreign-Held Bonds* and the doctrine on which the Couchots rely—remains valid today. *Cf. Delaware v. New York*, 507 U.S. 490, 503-504 (1993); *Texas v. New Jersey*, 379 U.S. 674, 680 (1964), *citing In re State Tax on Foreign-Held Bonds* (both analyzing the applicability of the doctrine of *mobilia sequuntur personam* in the context of State escheat laws). Thus, the fact that this Court overruled a *different* principle enunciated in *In re State Tax on Foreign-Held Bonds* is irrelevant. Respondents' reliance on *New York ex rel Whitney v. Graves*, 299 U.S. 366 (1937), similarly ignores the fact that the intangible property at issue in that case had acquired a "business situs" in New York which justified New York's taxation of the income from the property's sale. But the "business situs" exception to the doctrine of *mobilia sequutnur personam* is patently not applicable to Mr. Couchot's debt from Ohio.

4. Respondents say surprisingly little about *International Harvester*, and what they do say misses the mark.

Respondents emphasize that this Court viewed the tax in *International Harvester* as a tax on the nonresident-shareholder, not the corporation. The Couchots recognize



that fact. Pet. at 11. But this Court's *subsequent* treatment of *International Harvester*—as a case involving a tax on a *corporation*, *not* an individual—raises substantial questions as to the case's vitality. *Id.* Moreover, the fact that "*International Harvester* has never been questioned in any subsequent decision of this Court," Opp. at 12, is more a reflection of the fact that *International Harvester* has not been *cited* by this Court in *forty* years, than it is that *International Harvester* remains good law.

The reason it is imporant that *International Harvester* was decided before *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1976), Opp. at 12, is because *International Harvester* did *not* present a Commerce Clause challenge to the tax. Pet. at 11-12. For that reason alone, therefore, even if the Respondents are correct that *International Harvester* is "relevant, correct and controlling"—which the Couchots dispute—it is *only* "relevant, correct and controlling" as to the Due Process Clause. Respondents have implicitly conceded that this Court has *never* applied the Commerce Clause to facts like those in *International Harvester*. Indeed, Respondents' comparison of this case to *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is especially apt. This Court should review this case for the same reasons it reviewed the lower court's decision in *Quill*: subsequent developments in federal constitutional law have raised significant doubts as to the continuing validity of a prior decision of this Court; in this case, *International Harvester*.

5. The Ohio Supreme Court's decision conflicts with the decisions of other federal and state courts. The Ohio Supreme Court rejected the *Quill* "physical presence" test. Yet most federal and state courts have adopted that test in cases involving income taxes *and* other taxes. Pet. at 13-14. Respondents' statement that these other cases did not involve personal income taxes imposed on nonresident lottery winners is simply not responsive.

Furthermore, *Stark v. Comptroller*, 554 A.2d 458 (Md. Ct. Spec. App. 1989), *cert. denied*, 559 A.2d 791 (Md. 1989), is no better than the authorities it cites, which are the same authorities the Ohio Supreme Court cited in this case. The fact that the Ohio Supreme Court reached the same incorrect decision as a lower Maryland court is of no moment.

## CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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June 21, 1996